No. 505.

Affidavit for Appellants.

Filed Nov. 9, 1897.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

JAMES P. MERRITT ET AL.,
APPELLANTS,
v.
PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE ET AL.

No. 505

Appeal from the United States Circuit Court for the Northern District of California.

REPLY TO AFFIDAVIT OF GEORGE N. WILLIAMS IN OPPOSITION TO MOTION RESPECTING THE RECORD ON APPEAL.

1. Service of pending motion was made on opposing counsel on October 21, 1897. Proof thereof is on file with the Clerk. The *supplemental record* has not been served upon counsel nor was such service necessary. The notice fully informed counsel precisely what was to be asked and the record to be filed. It has been so filed.

2. The primary purpose of the affidavit is to suggest to

the Court that the pending appeal is in the view of opposing counsel without merit. *But* the Circuit Judge has allowed the appeal after appellees were fully heard in opposition. An important and substantial ground of appeal unconstitutional is presented. When the case is properly docketed, motion to dismiss is the proper and immediate course open to counsel whereon we should of right submit full printed argument. Obviously, the present effort to prevent consideration of appellants' appeal *at all* is neither proper nor just.

3. The transcript on the original appeal is contained in six volumes, embracing over 3,000 pages, and is certified by the Clerk on March 27, 1897, as a *full* copy of the entire record in the cause. The Clerk's certificate to the supplemental transcript now presented recites that it is a full transcript of all the record and proceedings in said cause transpiring *since* March 27, 1897. The Court has thus before it the *whole* record, as inspection of the Clerk's certificates will fully demonstrate.

4. The undersigned counsel believe that the Court will not and need not burden appellants with the great and unnecessary cost of merely *duplicating* the entire record now upon the files of the Court. The motion now presented is made in good faith to obviate that wholly unnecessary expense and burden. If the end desired should be attained by motion for leave to withdraw the original transcript in order to permit same to be recertified by the Clerk below, as on the present appeal, or for certiorari, whereon the Clerk below can make obvious return that the record so called for is *now* on the files of this Court, or any other procedure, is requisite to maintain technical compliance with proper *method* of reaching the end desired, counsel respectfully ask that such order may be entered. Obviously, whilst *form* is important, *substance*

should control, and the wisdom of the Court can readily supply the ignorance of counsel who freely admit that in making this plain, direct, but well-understood motion, they may easily have failed to anticipate the exact *form* most acceptable to the Court. The power of the Court must be conceded; its fair and just exercise is alone invoked. The *entire* record is here; opposing counsel insist that it must be brought here *again* by a complete new transcript, and these appellants burdened with great and unnecessary expense therefor. *Cui bono?*

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Attys. for Appellants.